

*United States Court of Appeals
for the Second Circuit*



APPENDIX

75-2113

Docket No. 75-2113

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

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THE PEOPLE OF THE UNITED STATES, ex rel.,

ALLEN M. ANDERSON,

Petitioner,

-against-

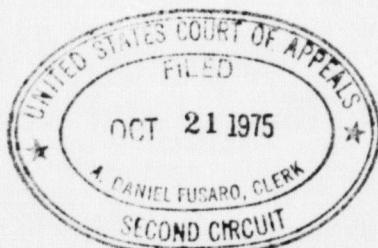
J. LELAND CASSCLES, Superintendent of Great
Meadow Correctional Facility,

Respondent.

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P/S

APPENDIX

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1. Petition for a Writ of Habeas Corpus.
2. Motion to Proceed in forma pauperis.
3. Affidavit in support of motion to proceed in forma pauperis.
4. Legal memorandum in support of Petition.
5. Appendices to legal memorandum in support of petition:
 - (a) Lists of jury panels in Albany County from January, 1971 to February, 1973;
 - (b) Deposition of Mrs. Helen Benson, Former Assistant Jury Commissioner of Albany County;
 - (c) People v. Marr opinion;
 - (d) People v. Attica Bros. opinion;
 - (e) Appellate brief-Respondent;
 - (f) Order denying application to appeal denial of motion to vacate judgment of conviction;
6. Application for certificate of probable cause.
7. Certificate of probable cause.
8. Notice of Appeal.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

THE PEOPLE OF THE UNITED STATES, ex rel.
ALLEN M. ANDERSON,

Petitioner,

-against-

75-CV-137

J. LELAND CASSCLES, Superintendent of
Great Meadow Correctional Facility,

Respondent.

EDMUND PORT, Judge

Memorandum-Decision and Order

The Clerk of the court has sent to me for my consideration a petition for a federal writ of habeas corpus, together with an affidavit in forma pauperis from a state inmate presently confined in the Great Meadow Correctional Facility, Comstock, New York. The petition was prepared for the inmate by the Albany Law School Legal Assistance Project, 80 New Scotland Avenue, Albany, New York 12208.

The petitioner was convicted in the Albany County Court, after a jury trial, of Assault 2nd degree, and was sentenced on March 8, 1973, to a two-to-five year prison term. The Appellate Division affirmed¹ and the Court of Appeals denied leave to appeal on December 18, 1973. Petitioner also informs the court that he made a pro se motion to vacate his sentence to the Albany County Court, which was denied on June 28, 1974; leave to appeal

1. People v. Anderson, 42 A.D.2d 1007, 348 N.Y.S.2d 227 (3rd Dept. 1973).

this decision was denied by the Appellate Division, Third Department on September 5, 1974.

The following claims are made: (1) there existed in Albany County at the time of petitioner's trial, a systematic and intentional exclusion of "students" ² from lists from which petit jurors were chosen, and (2) blacks were underrepresented on petit jury lists in general and on petitioner's petit jury panel in particular, by the usage of various petit juror selection processes which amount to, in petitioner's opinion, intentional exclusion, and, finally, (3) the Albany County Jury Commissioner failed to abide by the provisions of §§ 650-689 of the N.Y. Judiciary Law in selecting trial jurors. These deprivations are alleged to have violated petitioner's rights under the Sixth and Fourteenth Amendments.

An examination of the petitioner's brief on appeal to the ³ Appellate Division reveals that the third claim raised herein was not exhausted in the state courts; accordingly, this claim will be denied and dismissed for that reason.

Prior to petitioner's trial, he made a challenge to the jury panel and a hearing was held before the Hon. John J. Clyne, Albany County Court Judge, in February 1973 at the conclusion of which

2. Petitioner claims to have been black and a student at the time of his prosecution.

3. Supplied to the court, together with other relevant state court papers, by the petitioner.

Judge Clyne rendered a three page decision denying the challenge.⁴

Judge Clyne found, among other things, that:

(1) petit jury selection in Albany County was in accordance with the pertinent provisions of the N.Y. Judiciary Law;

(2) there was no proof of a deliberate exclusion of persons by reason of race or economic status, and that there was "an extra effort" on the part of the Commissioner to increase the number of potential black jurors;

(3) petitioner failed to meet his burden of demonstrating an intentional and systematic discrimination and failed to establish his claim of an illegally constituted jury.⁵

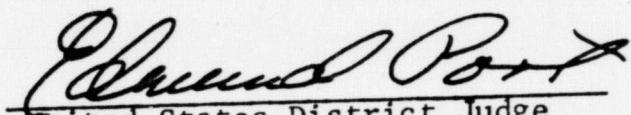
Upon a careful examination of the papers and the state court records herein, I am of the opinion that the petitioner has had a full and fair hearing that resulted in reliable findings by the state court, which are supported by the record. Townsend v. Sain, 372 U.S. 293 (1963). I am convinced that the state court determination, in connection with the issues raised herein, was correct for the reasons set forth in Judge Clyne's memorandum. The petition has failed to overcome the statutory presumption of correctness applicable to the state court determination and the petition will

4. Dated February 16, 1973.

5. A conclusion with which this court agrees after reading the hearing minutes. The hearing consisted of but two witnesses: Richard P. Haggarty the Albany County Commissioner of Jurors, and one Dr. Harry Hamilton, an associate professor of Atmospheric Science at the State University of New York at Albany, New York. The actual hearing consumed only 48 pages of transcript - 28 for Haggarty who testified regarding petit jury selection procedure, and 20 for Hamilton who testified chiefly regarding statistical probabilities in connection with petitioner's petit jury panel.

be denied and dismissed. 28 U.S.C. § 2254(d). Townsend v. Sain, supra.

For the reasons herein, it is
ORDERED, that the petition herein be and the same hereby
is denied and dismissed. Leave to proceed in forma pauperis
is granted, and the Clerk is directed to file the papers herein
without the payment of fees.


United States District Judge

Dated: March 17, 1975.
Auburn, New York.

Appendix A

A 5a

STATE OF NEW YORK - ALBANY COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK

-against-

ALLEN MORRIS ANDERSON, a/k/a
ALLEN STROTHERS,

Defendant.

BEFORE

HON. JOHN J. CLYNE

County Court Judge, and a Jury.

APPEARANCES:

HON. ARNOLD W. PROSKIN
District Attorney, Albany County
Albany County Court House
Albany, New York
By DANIEL S. Dwyer, ESQ.
Assistant District Attorney

On behalf of the People.

FEIT, SCHLECKER & KATZ, ESQS.
142 Washington Avenue
Albany, New York
By MICHAEL A. FEIT, ESQ., of Counsel
Attorneys for Defendant.

ALLEN MORRIS ANDERSON, Defendant, Present.

TRANSCRIPT OF PROCEEDINGS in the above-entitled
matter held at a trial term of the Albany County Court, at
the Albany County Court House in Albany, New York, commencing
on Wednesday, February 14, 1973.

(Allen J. Hanley, C.S.R.)

Official Supreme Court Reporter - State of New York

(The following transpired in chambers:)

MR. FEIT: Your Honor, this is the defendant, Mr. Anderson.

THE COURT: All right. Let the record indicate the appearance of the defendant, Mr. Anderson; his counsel, Mr. Feit; and the District Attorney's Office represented by Mr. Dwyer. All right, Mr. Feit.

MR. FEIT: Your Honor, at this time, prior to the commencement of the trial and the selection of a jury, I would like to formally make a challenge to the jury panel. In support of my challenge I submit to the Court a written challenge in connection with this motion, and a copy to the District Attorney's Office.

Essentially, the grounds upon which the challenge is made is that the manner in which the jury panel has been selected is in violation of Mr. Anderson's constitutional rights, which entitle him to due process and equal protection of the laws; and, more specifically, that black persons, culturally different persons, persons of lower economic status, as well as persons of lower ages, have been systematically excluded from and are substantially under represented on the panel, and this is not representative of the

community at large in Albany. I have cited some authority in my papers in support of this motion, and I am asking the Court to conduct a hearing on this question if there is opposition, and to dismiss the present panel and order a new panel before commencement of the trial.

THE COURT: Mr. Dwyer.

MR. DWYER: If it please the Court, I oppose Mr. Feit's application at this time. I believe this application was done in a prior case, and I have submitted prior authority to the Court. But I certainly would be willing to submit an affidavit in opposition and set forth what I feel to be the law, but if the Court requires a hearing to be conducted, we will be happy to conduct one.

THE COURT: Do I understand, Mr. Dwyer, that the People wish to submit papers in opposition to the challenge? Is that correct?

MR. DWYER: We do, your Honor. I might point out to the Court that in 1968 a similar challenge was made and denied at that time in reference to the selection of panels by this very county.

THE COURT: All right. Would it be possible

for the People to have their pleadings to this Court and defendant's counsel by 2 o'clock this afternoon?

MR. DWYER: I believe we can submit an affidavit by that time.

THE COURT: All right, we will adjourn this matter until 2 o'clock this afternoon. I will then examine the papers of the People, and in the event that there is an issue raised, this Court will conduct a hearing on the issue. The matter is adjourned until 2 p.m.

MR. DWYER: Thank you, Judge.

(Recess for lunch.)

THE COURT: This is the case of the People of the State of New York against Allen Morris Anderson, also known as Allen Strothers. Allen Anderson, is that you, sir?

DEFENDANT: Right.

THE COURT: You are represented by your attorney, Mr. Feit? (Defendant nods his head affirmatively.)

The People are represented by Mr. Dwyer. Let the record indicate that this morning, prior to the selection of a jury in this case which was called this

date for trial, the defendant's attorney served upon the People and handed up to the Court a challenge to the jury panel. At that time the Court provided the People with an opportunity to answer said challenge, and the People indicated that they would have such answer available to this Court by 2 p.m. It is now shortly thereafter. The People have handed to the Court an affidavit in opposition to the challenge and provided a copy of the same to the defendant's counsel.

Correct?

MR. FEIT: Yes, that's correct, your Honor.

THE COURT: The answer of the People puts in issue the challenge to the panel, seeks a denial of the challenge without a hearing based on the insufficiency of the moving papers. Is that a fair statement,

Mr. Dwyer?

MR. DWYER: Yes, your Honor, for the lack of factual allegations contained in the moving papers.

THE COURT: Section 270.10 of the Criminal Procedure Law indicates that such a challenge shall be made on the ground that there has been a departure from the requirements of the Judiciary Law in the drawing or return of the panel as to result in substantial

prejudice to the defendant.

The thrust of the challenge as this Court reads the same is that black persons, culturally deprived persons, persons of lower economic status, as well as persons of lower ages, have been systematically excluded from this panel. Is that the basic thrust of the argument, Mr. Feit?

MR. FEIT: Yes, it is, your Honor.

THE COURT: The moving papers do not set forth any factual allegations concerning that conclusion. Isn't that the fact, Mr. Feit? (No. 814)

MR. FEIT: Your Honor, in response to that observation, I would like to say that it was impossible for the defendant or myself to ascertain the exact composition of the panel prior to our being here in court this morning; that upon examination of the list of jurors and a revised list which indicates by checkmarks --

THE COURT: Mr. Feit, I am going to ask you to stand when addressing the Court, if you would.

MR. FEIT: Yes, your Honor. On the revised list of the panel of county trial jurors to report February 5, 1973, there are checkmarks alongside of the

names of those jurors who, as I understand it, as I am advised by the clerk of the court, are present for jury service; that upon examination of that list, there appeared to be 65 persons who are indicated to be serving as jurors; that of those 65 persons, 50 persons reside in the City of Albany and 15 persons reside in Albany County outside the City of Albany; that the census, the 1970 census for Albany County, indicates there were 285,618 residents in Albany County and 115,781 residents in the City of Albany.

Now, this is one disparity. Where residents of the City of Albany constitute 40 percent of the county, they constitute 70 percent of the panel of this jury. Further, according again to the census of 1970, there are 13.5 percent --

THE COURT: Is the City of Albany within in the County of Albany?

MR. FEIT: Yes, your Honor.

THE COURT: This is a County Court jury panel?

MR. FEIT: Yes, your Honor. I make that distinction in order to show that --

THE COURT: How does that prejudice this defendant?

MR. FEIT: Your Honor, I think it's clear that in making such a challenge the initial burden to make a prima facie case is upon the defendant; that courts have construed irregularities or statistically unique situations as evidence of the fact that there may be disparity, there may be departure from the requirements of the Judiciary Law.

THE COURT: Answer this: Assuming that 50 out of the 65 jurors are from the City of Albany; how does that prejudice this defendant?

MR. FEIT: Well, your Honor, as we pointed out in our papers and through my personal observation of this jury panel, I detected one black person.

THE COURT: Well, no, first answer that question. How does the fact that 50 out of 65 coming from the City -- which I am taking your figures; I haven't examined it myself -- how does that substantially prejudice the defendant?

MR. FEIT: Your Honor, that in itself may not constitute prejudice; however, I think it does point out the fact that where 40 percent of the population comes from the City and 77 percent of the jury comes from the City, that there may be less than

a random selection of jurors for this panel, and it is
that --

THE COURT: How do you reach that conclusion?

MR. FEIT: I believe that the statistical
probability of that number of jurors --

THE COURT: What does the Judiciary Law say
as to the selection of the panel?

MR. FEIT: Well, your Honor, it says a number
of things. It sets forth the manner in which the
Commissioner of Jurors may acquire names to be included
in the jury list.

THE COURT: Right.

MR. FEIT: It offers suggestions that the
city, village or town directories may be used; that the
telephone directory may be used; that voter registration
lists may be used and that assessment lists may be used.

Part of our contention -- and this is why
we are requesting a hearing, is to attempt to determine
whether or not this seeming statistical disparity is
in fact based upon either an intentional exclusion of
black persons or poor persons or persons of younger
ages or whether it's due to a failure on the part of
the Commissioner of Jurors to consciously obtain a

balance on the jury panel consistent with the racial and age balance in the community. Therefore, at the initial stage I think that this raises a question based upon the fact that 77 percent of the jury panel is from the City of Albany.

THE COURT: This is by way of oral argument, because there is nothing in your papers to this effect; is that correct? You make the conclusory statement that basically black persons and persons of lower economic status, as well as persons of lower ages, have been systematically excluded; correct? That's your conclusion?

MR. FEIT: Yes. Your Honor, what I am attempting to set forth at this time -- only this morning have I had an opportunity to physically examine the panel, and finding only one black person --

THE COURT: Mr. Feit, when was this case marked ready for trial?

MR. FEIT: This case was marked ready for trial Tuesday of this week, your Honor.

THE COURT: Mr. Feit, there was a calendar call on February 5th of the criminal calendar. This case was on that calendar and was marked ready at that

time; isn't that true?

MR. FEIT: That is true, your Honor.

THE COURT: So that really you have had since February 5th until this date if you chose to investigate a challenge to the panel; isn't that the fact?

MR. FEIT: Your Honor, as a matter of fact --

THE COURT: Well, isn't that true?

MR. FEIT: It's true, conditioned upon the fact that I was able to be present at a time when this panel was present.

THE COURT: They were sworn in February 5th. I didn't notice that the door was locked. As a matter of fact, it wasn't. And they have been here on other days since and, as a matter of fact, there was a jury selected in another case earlier this week. So, there has been opportunity to observe, that's all I am pointing out, and I assume you concur in that statement.

MR. FEIT: I would have to concur that there was opportunity. I would like to point out that I was not able to, nor did I, prior to this morning have an opportunity to make those observations.

I would just like to add, in the context of what I have just said, that the 1970 census of the City

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of Albany indicated that 13.5 percent of the residents of the City were black persons, and that given 50 persons from the City of Albany being present on this panel, the statistical probability is that there would be seven black persons on the panel. As I have observed, there is one black person. This further I believe supports our argument that there has been some discrepancy in the manner in which this jury has been selected. (M)

THE COURT: Mr. Feit, in an earlier case this week the defendant's counsel in open court in the presence of the panel made such an observation to the Court. A quick and cursory observation by the Court of the panel at that time would appear to bear out that fact, that there was one black on the panel. That was the statement made. The people made no statement to the contrary and, as I say, a cursory examination of the panel by this Court would appear to bear that out. So, I am aware of that fact. At least, I am going to assume that to be the fact unless I have any evidence to the contrary from the People. So, you proceed from that point.

MR. FEIT: Your Honor, there has recently

been reported a case in Albany County, in the Justice Court, The People v. Marr, a case in which a challenge was made to the panel of jurors based upon --

THE COURT: That's Judge Tate, Misc. 2d, you are referring to?

MR. FEIT: Yes, your Honor. And in that opinion, which goes into the question of the manner of drawing and selecting jury panels, there is a reference to a Fed. 2d decision and the Court indicated that purposeful discrimination exists whenever significant unexplained disparity exists. I am quoting the Court of Appeals case.

THE COURT: As I understand the case law from a quick examination, that statistics standing alone are not sufficient to warrant or support a challenge to the panel. That is a quick examination, and I would like to hear your comments on that.

MR. FEIT: Your Honor, I would agree with your impression of the law as I have read it also, that statistical irregularities in and of themselves are not sufficient to support the challenge. However, I believe that the statistical irregularities which have been mentioned in this case are sufficient to

warrant a hearing being held to determine whether or not in fact there have been discrepancies, as we contend, that would be violative of the defendant's right to due process and equal protection in this case, and I submit that we have offered in our papers and in this court appearance the basis for warranting a hearing to be held.

THE COURT: Are you telling me that you don't feel that he can get a fair trial with this jury panel?

MR. FEIT: Yes, your Honor.

THE COURT: On what theory? That it's not statistically perfect?

MR. FEIT: No, your Honor. I believe that it's important in a case of this nature, which involves a confrontation between a police officer and a black person, that the defendant be given an opportunity to have a panel where persons of similar cultural background or economic background are present.

THE COURT: Let me say this: I find it very difficult in my own mind to really follow this entire argument, for the reason that my recollection of the law of this State is that there can be no discrimination

because of race, creed or color. Isn't that the law?

MR. FEIT: I think that is the law, your Honor.

THE COURT: Now, my mind says to me that if there can't be any discrimination, there can't be any discrimination, either/or. In other words, if they are all white or all black, it makes no difference. If they are Jewish or all Catholic or all Protestant, it makes no difference. This is what the law says as I view it. This is the law in this State, isn't it?

MR. FEIT: Yes, it is.

THE COURT: No discrimination. Now, is there going to be no discrimination on this particular point, but over here you raise discrimination? I have a problem in my own mind, that's what I am saying.

MR. FEIT: I think that there have been many cases that have discussed and have determined whether or not certain situations are violative of the law that says there shall be no discrimination, and in this case what we are doing is submitting that we believe, based upon what has been said, that this may be true here.

THE COURT: Well, isn't the test here whether this defendant is going to be prejudiced? Isn't that

the test?

MR. FEIT: I think that is the ultimate test.

I think that the issue we raise is whether there has been any proceedings that will militate against the ultimate test being reached.

THE COURT: All right. Do you have anything further?

MR. FEIT: Nothing further.

THE COURT: Mr. Dwyer, do you wish to be heard?

MR. FEIT: Your Honor, if I may add, there is one other point that relates to the Judiciary Law but on a different plane entirely, and it's Section 669 of the Judiciary Law, which requires that a County Judge be present at the time the jury panel is being drawn, and I just wanted to inquire whether or not in the case of this particular jury you were present.

THE COURT: I was present.

MR. FEIT: Thank you.

THE COURT: Mr. Dwyer.

MR. DWYER: May it please the Court, I would just like to comment to the Court, if I may paraphrase the Court myself, that although a statistical evaluation

was not done of this panel, by observation I concur that apparently there is one black in this present panel and, if your Honor please, that has no bearing on this issue whatsoever. The issue before the Court that must be presented to the Court factually is that in the selection of this panel overall there was by design a systematic exclusion on the part of the Commissioner of Jurors disallowing blacks or younger people to serve. And any inference of that nature certainly cannot be drawn as a result of what we see here today.

THE COURT: Agreed.

MR. DWYER: And there has been no proof offered, no factual proof; just conclusions that, Q.E.D., because we have 66 people and 1 black, there has been systematic exclusion, without any proof being adduced from defendant's counsel. Therefore, I feel that the papers on their face are invalid to raise any factual issue, and I ask the Court to deny the challenge.

THE COURT: Mr. Dwyer, in many respects I concur in what you have stated. By the same token, the defendant perhaps should have an opportunity to assure himself by a hearing that there has not been any design to systematically exclude any particular group

of citizens of this County from this panel. The sufficiency of the moving papers may leave a little to be desired, but the thrust of the challenge is clear and, rather than base my determination on form alone, I am going to look to the substance of the matter and I am going to grant the hearing at this time. I feel that there is a very close question as to whether or not the defendant is entitled to it on the papers, and yet I think we can clear the air perhaps once and for all, not only for this term but subsequent terms, by having a hearing concerning the issues raised by the pleadings before this Court at this time. Consequently, I am going to order a hearing pursuant to the challenge; forthwith.

MR. DWYER: I was going to ask the Court to say that.

THE COURT: Mr. Feit, I will give you an opportunity to proceed at this time.

MR. FEIT: Your Honor, I have, in anticipation of the possibility of granting such a motion, prepared a subpoena duces tecum for the Commissioner of Jurors of Albany County.

THE COURT: Mr. Feit, I do not think it will

be necessary. When this motion and this challenge was submitted to the Court this morning, this Court took it upon itself to advise the Commissioner of Jurors that such a challenge had been made. At that time I did not know what I would do insofar as ordering a hearing or not, but the Commissioner of Jurors being a public servant, I have requested his presence in the building, as it is in any event, and he is I trust present in the building. So, if you would go to the Commissioner of Juror's office and request his presence in this Court at this time, I feel certain that he will comply.

MR. FEIT: Thank you, your Honor. I would just like a few moments also to contact one or two witnesses that I wish to call.

THE COURT: You may have that opportunity. The Court will take a short recess. We will commence at 3 o'clock, gentlemen.

(Short recess.)

THE COURT: Let the record note the appearance of the defendant, his counsel, and Mr. Dwyer for the People. You may proceed, Mr. Feit.

MR. FEIT: Your Honor, at this time I would

like to call Mr. Haggerty, the Commissioner of Jurors.

THE COURT: All right

County of Albany, New York election district books.

RICHARD P. HAGGERTY,
called by the defendant, having been first duly sworn
according to law, was examined and testified as
follows:

DIRECT EXAMINATION

BY MR. FEIT:

Q Will you state your address for the record, please.

A What?

Q Your address, your home address.

A 2 Road Street, Albany, New York.

Q Mr. Haggerty, what is the nature of your employment?

A I am the Commissioner of Jurors for the County of Albany.

Q And for how long have you been employed as the
Commissioner of Jurors?

A Two years.

Q Now, Mr. Haggerty, in your own words, if you will, will
you describe the general procedures for obtaining
names for panels of juries and what procedures your
office follows in obtaining the names and in processing
them.

A Well, we take the names from the city directory, the telephone book, and I have a list of each district in the County of Albany, from the election district books.

Q Now, is there any one single list that you rely upon first and then supplement with others, or how is it done?

A No, we pick them from the election books first and then we go to the city directory or the telephone book, either one.

Q And what happens? Once you get a name, how is this recorded?

A Then we take and send them a form, unless we have their name in the files already. We check the names first to see if there is a name in the file. If there is no name in the file, then we send them a form to fill out. They send that form back, and then we look it over, and if they are O.K., eligible to serve on the jury, then we take and make a slip with their name on it.

Q Now, you say you maintain a list of all persons in Albany County; is that right?

A Not all, no. Only the ones we -- we got a list in the files of people that's got their names in the drum. Then we look in the books for other names. If they are

not in the list, we take them out of the book and we send them a form, and then they fill them out and send them back to us.

Q Now, how often is this done, that you --

A Send the forms out? Boxes containing the names of

Q Yes. Boxes containing the names of

A We send them out every day.

Q Every day. So, this is an ongoing process?

A Yes, sir.

Q And you mentioned a drum. This is a container of some kind that --

A It's a big drum that you turn around, with all these names in it. There is about eight or nine thousand names in it.

Q And this drum contains the names of all the eligible jurors in Albany County?

A Right.

Q Now, you indicate that after a name is obtained you mail out a questionnaire or a form to the person?

A Yes, with questions on it, that they have to fill them out before they can serve on a jury.

MR. DWYER: Mr. Haggerty, please speak up so I can hear you, too, please.

BY MR. FEIT:

Q And at some point in time these forms are returned by the person to whom they were sent?

A Right.

Q Now, do you keep any records regarding the number of forms that are actually mailed out?

A We don't keep a record of the forms sent out, but we keep a record of the forms that have come back in to us.

Q Let me ask you this: Do you have any idea of the percentage of the forms that are actually sent out as compared with the number of forms you get back?

A Well, like you say, when we send forms out, you want to know how many we get back out of the amount of forms?

Q Yes, if you can approximate the number.

A We send maybe a hundred out, and maybe we might get 25 back. The rest of them don't even send them in. Some send them in just blank with nothing on them.

Q Is there any procedure for following up on the persons who don't comply?

A Well, the only thing we can do then is wait a couple of months and send them again and see what happens.

Q Do you have a procedure which allows you to do this;

in other words, to periodically resend out questionnaires?

A We go right over the books again. When we get through the books, then we start right all over again, and find out if we got certain ones in the records of ours, and if they ain't there, we send them out a form again.

Q Now, when a questionnaire is returned and it's not a blank one, when it has something on it, what is the procedure for determining whether or not that person qualifies to be on the panel?

A Well, the questions on there, if they answer the questions right and they are O.K., then we O.K. them to serve on the jury. I do that myself. And if they are not -- like if they are -- if some woman is a policeman's wife or a lawyer's wife or something like that, well, then we can't let them serve on a jury.

Q Now, I believe the Judiciary Law makes a distinction between someone who is disqualified from serving and then someone who is exempt from serving; is that right?

A Right.

Q At this initial stage do you make a determination both as to disqualification and the exemption?

A Do I make it?

Q Yes, at the time that the cards come back.

in other words, to periodically resend out questionnaires?

A We go right over the books again. When we get through the books, then we start right all over again, and find out if we got certain ones in the records of ours, and if they ain't there, we send them out a form again.

Q Now, when a questionnaire is returned and it's not a blank one, when it has something on it, what is the procedure for determining whether or not that person qualifies to be on the panel?

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Q Now, I believe the Judiciary Law makes a distinction between someone who is disqualified from serving and then someone who is exempt from serving; is that right?

A Right.

Q At this initial stage do you make a determination both as to disqualification and the exemption?

A Do I make it?

Q Yes, at the time that the cards come back.

A When they come back, then I look them all over and see whether they are entitled to serve on a jury or not.

Q I believe the Judiciary Law provides that you may inquire of law enforcement agencies as to whether or not someone has been convicted of a crime. Do you do this routinely?

A I didn't get that.

Q I believe you are authorized by the Judiciary Law to make requests of law enforcement agencies pertaining to whether or not someone has a criminal record.

A Right.

Q Do you do this in every case?

A Yes, they put on -- there is questions there that ask you whether you were ever arrested or anything else, and if they put it down there, a felon or whatever it is, we don't let them serve.

Q Now, do you make an inquiry -- where someone has said that they have not been convicted of a crime, do you ever routinely seek to find out whether or not they have been, even though they may have said they haven't?

A In other words, you are asking me, do I question them whether they were?

Q Yes.

A I wouldn't know whether they were. If they put down -- they are the ones filling these forms out. I have no way of finding out whether they were arrested or not.

Q Now, there is a question, I believe, on the questionnaire that asks whether or not someone has a judgment or judgments against them; is that right?

A Yes.

Q Could you state to the Court the purpose of that question, why that question is on the form?

A No, I couldn't; I couldn't tell you why it's on there. I know it's on there.

Q Now, can you tell us to what extent that question plays a role in your determining whether or not someone qualifies to be a juror?

A Well, like if somebody says on there that they owed so much money but then they paid it back and everything is all right, we qualify them to serve on a jury.

Q But should they answer that they do have judgments against them, would that disqualify them from serving?

A Yes.

Q Now, you said that maybe out of every hundred forms that you send out you may get about 25 or so back?

A Right.

Q Of the ones that you get back, do you have any idea how many of those do go into the drum as qualified and how many are either disqualified or exempted from service?

A Into the drum?

Q Yes. Of the ones that are returned, I just would like to know whether or not you know the percentage of the ones that are disqualified or exempt, from the returns that you get from persons.

A Well, we don't go into the drum at all. When we get these back, if they are disqualified, we just put them -- we keep a record of them.

Q The ones that are qualified, it doesn't go into the drum at that time?

A No, sir. Thirty days after.

Q Now, how often are names drawn from the drum?

A From the drum?

Q Yes.

A Every month.

Q And the jurors for the County Court come from that selection?

A Yes.

Q Mr. Haggerty, are you familiar with a decision of the

Colonie Justice Court, Judge Tate, of September of 1971, where there was a question raised about whether students were automatically excluded from the jury list?

A I was not here at the time.

Q Do you know of your own knowledge whether or not students, people who answer as to their occupation that they are students -- whether or not they are included on the list of qualified jurors?

A Do I what?

Q Let me rephrase the question. Are people who are students automatically excluded from jury selection?

A They are automatically -- we put them off, we exempt them for the time being, until they are out of school, because some of them put on the back that they are in school and they won't be home until a certain time, and we can't promise them then that they can be on the jury.

Q Now, do you maintain any records about the number or percentage of jurors that sit on county trial juries that come from the City of Albany?

A You mean individually of the City of Albany?

Q Yes.

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A No, we don't. We just pick them out, and we have the record. If they are from the County or the City they are all on the one sheet.

Q In the time that you have been Commissioner of Jurors, have you observed an unusually large number of County Court Jurors that come from the City of Albany?

Well, it's up to --

MR. DWYER: I am going to object to the form of the question. It's calling for a conclusion. I don't feel it is in the knowledge of this witness, also.

THE COURT: I am going to sustain the objection as to form.

BY MR. FEIT:

Q Mr. Haggerty, of your own knowledge, if you do know, what has been the percentage of county jurors with respect to persons from the City of Albany?

A In other words, you want to know if I know how many is from Albany and how many is from the County?

Q Yes.

A No, I couldn't tell you that.

Q Do you ever have situations where persons write to you indicating that they would like to serve on a jury?

A Yes, sir.

Q And what happens with respect to those persons?

A Well, we send them a form and let them fill the form out.

Q Now, I believe the present Judiciary Law exempts women from serving on the jury. Do you know that to be true?

A That's right.

Q Is it your practice to disqualify or exempt someone simply because she is a woman from serving?

A Any woman that sends in the form and says on there, "I am a woman; I do not care to serve," we exempt them.

Q Only where they express a desire not to serve; is that right?

A Right. But if they don't mention it, we let them serve.

Q In the time that you have been Commissioner of Jurors, has it ever come to your attention that black persons in the community seem to seldom serve on juries?

MR. DWYER: Well, I object to the form of the question, and it is calling for a conclusion on the part of this witness.

THE COURT: I will sustain the objection as to form.

BY MR. FEIT:

Q Mr. Haggerty, do you of your own knowledge -- I withdraw that. Mr. Haggerty, of your own knowledge can you tell the Court the number of black persons that are serving or have within the last year served on the jury panels?

A No, I cannot.

Q Does the fact that someone is receiving welfare assistance in any way influence your decision to qualify or disqualify someone for service?

A Well, I wouldn't know whether they are on welfare or not. They don't have nothing like that on the form. I wouldn't know whether they are welfare or what they were.

Q Do you make any effort to ascertain whether or not persons are or are not on welfare in deciding whether they will serve?

A No.

Q Now, could you state to the Court, in addition to disqualifications that you would notice, that meet the statutory requirements, are there any other factors that you use in deciding whether or not to add a name to the list of jurors?

A The only way we add any more names is if people come in and want forms to fill out; they want to serve on a jury; or they call in or they send a letter, like you say. That's the only way we do it.

Q Are the assessment rolls used at all to ascertain names for the jury lists?

A You mean people that come in looking for forms and stuff?

Q No. When you are looking for new names, do you rely upon the assessment rolls at all to find names?

A No, we don't have the assessment list.

Q Now, you have already stated that persons who are students are excluded. Is there any age level, a point at which that if a person is less than a certain age that you do not add their name to the jury list?

A 21 years old.

Q 21 years of age?

A Right.

Q Is there any upward limit?

A 72.

MR. FEIT: Your Honor, may I have a moment, just a brief moment?

THE COURT: Yes, you may.

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BY THE COURT:

Q Do you have that form with you, Mr. Haggerty?

A No.

Q Is it a standard form that you use?

A Yes.

Q I would appreciate it if you would submit the form to the Court when you are through here.

A Yes, sir.

MR. FEIT: Your Honor, I believe that certainly a form -- the standard form is set forth in the Judiciary Law.

THE COURT: I would like to see the form that is sent out from the Albany County Commissioner of Jurors' office. All right?

MR. FEIT: Yes, sir.

BY MR. FEIT:

Q Mr. Haggerty, what happens to the cards that are returned and where jurors are disqualified?

A You mean the summons they get?

Q No. When you send the questionnaire out and they are returned and some are marked as qualified, others are either disqualified or exempted. What happens to the cards?

A They are all downstairs. You mean the ones that are disqualified?

Q Yes.

A The forms?

Q Yes.

A We got them downstairs.

Q You maintain records of those?

A Yes.

Q Has there been any effort on your part or any of your staff to seek to get the names of black persons on the jury panel?

A Yes. I do that myself. I tell these people -- I know these wards where pretty near 75 percent are colored people or black people, and I tell them to send them forms to me.

Q How is this done?

A As it comes out of the election books, the districts in the election books, and what wards they are.

Q And have you been doing this since you have been the Commissioner?

A Yes, we have been sending them out to them right and left.

Q And could you state to the Court the results of these

efforts?

A Well, I will tell you, some of them don't send anything back at all. Other ones send them back, and they are working; they are women out working and they can't get the time off; they don't want to serve. The men, the same way; work in construction; they got three or four children. So, we try to please them; we disqualify them or exempt them at the time.

Q Would some of these persons that are excused be persons who are persons other than persons who are disqualified or exempted by the statute?

A What was that now?

Q Let me rephrase it. Are some of the black persons who are excused, who are not added to the jury list, persons who are persons other than ones who would be either disqualified or exempted by the statute?

A (No response.)

Q In other words, are you doing this at their request primarily?

A Yes.

MR. FEIT: I have no further questions.

THE COURT: Mr. Dwyer.

CROSS-EXAMINATION

BY MR. DWYER:

Q Mr. Haggerty, in reference to the last question addressed to you by Mr. Feit, is there any basis for exclusion of black persons other than at their own request and their qualifications as jurors pursuant to Section 504 of the Judiciary Law?

A In other words, you mean they fill the questionnaire out and if there is something --

Q Well, all right, I will rephrase this if you don't quite understand it. If a black person fills out a questionnaire submitted to him and in that questionnaire he does request that he be allowed to act as a juror and he is qualified to act as a juror under Section 504, there is no impediment now, is there? What do you do with an application such as that?

A Well, he sends the form back in; we make out a card for him or a slip, and the slip goes into the -- after 30 days, it goes in the drum the same as any other.

Q And I take it this drum you were referring to is a drum for jurors throughout the county, is that correct?

A All over the county, yes.

Q There is no differentiation made between the residents

of the City of Albany and the City of Watervliet, is
there?

A No, everything goes in the one drum.

THE COURT: Does that include trial jurors
and grand jurors?

THE WITNESS: Well, the grand jurors, your
Honor, they pick the grand jurors in December for the
whole year; they pick 500 names.

THE COURT: They come out of the big drum;
right?

THE WITNESS: Yes, out of the big drum, and
they go over into a second drum.

THE COURT: And they are put in the grand
jury drum?

THE WITNESS: Yes, that's the way we pick the
grand jury.

THE COURT: The big drum that the trial jurors
are drawn from, they are for both Supreme Court and
County Court; is that correct?

THE WITNESS: Right.

THE COURT: Out of the one drum?

THE WITNESS: Right.

THE COURT: And any other jurors that must

be drawn throughout the year to serve within the County; is that correct?

THE WITNESS: Right.

THE COURT: Let me ask you this: Approximately how many names are contained in the large drum?

THE WITNESS: I would say 7,000.

BY MR. DWYER:

Q I just want to be clear on one point Mr. Feit asked you, Mr. Haggerty. These forms you send out, are they returned to you unanswered, many of them?

A With nothing on them?

Q Yes.

A Yes.

Q Now, do they get returned to you unanswered, plus the persons won't take it or accept it and just merely return it or refuse to accept the mail?

A We send -- no, we send out a form in an envelope and we put them in another envelope and it's got our name, "Commission of Jurors"; they open it up and then send it right back with nothing on it; don't say nothing at all.

Q Then you do have a record, I take it, sir, of all the forms you do send out; you do keep that record?

A Right.

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Q And this list, I believe you told Mr. Feit, the source of names, do you consult the assessment rolls in any way?

A No, sir.

Q Do you use the census?

A No.

Q The city directory?

A Yes.

Q And the telephone directory?

A Yes, and the election books.

Q And the election books?

A Every district in the county.

Q Does the form that you send out have a question in reference to a person's race on it?

A The race?

Q The race.

A No, it has nothing to do with -- you mean the race --

Q The race of the person.

A No, there is nothing on there that says that.

Q I take it when you receive a form back, a return form, you yourself or any member of your staff has no idea as to the race of the person answering?

A No, sir.

Q And any judgment you make in reference to this person's

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ability to serve as a juror is predicated upon his qualifications as set forth in Section 504; is that correct?

A Right.

Q It has nothing to do with his race?

A No, sir.

Q Now, one other point. As far as disqualifications and exemptions, I believe you said once you get the form back, you check it over and you discern then if a person for some reason or other is disqualified; is that correct?

A Right.

Q Now, if a person was exempt but not disqualified, namely, a woman -- if a woman returned the form to you and did not exercise her right of exemption and said nothing and said she would act, how would you react to that statement on behalf of this woman?

A If she sends in her form and she don't say she wants to be excused?

Q Right.

A Then she serves on the jury. Then we make out a copy of her name and address on a slip and in 30 days we put her name in the drum.

Q So, then, you yourself or as the Commissioner of Jurors would not disqualify her; she would exempt herself?

A That's right.

Q You would exercise your rights in reference to disqualification based upon the information you have?

A Yes, sir.

Q And as far as the authenticity of this information, you rely on what is set forth by the individual?

A Right.

THE COURT: Do I understand it to be the policy of your office that an exemption must be affirmatively claimed?

THE WITNESS: By the persons themselves?

THE COURT: Yes.

THE WITNESS: Yes.

THE COURT: In other words, otherwise you don't exempt them?

THE WITNESS: No, if they don't ask for an exemption or an excuse, they go onto the jury list.

BY MR. DWYER:

Q Do you have any other authorized policy in reference to the selection of jurors in addition to the sections that are appropriate in the Judiciary Law; in other

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words, special provisions set forth for juror qualifications in Albany County?

A No special, no; everybody gets the same treatment.

Q Well, I mean, there are no special rules that have been set up in reference to the selection of jurors in addition to the rules you follow in the Judiciary Law, is there?

A No.

MR. DWYER: I have no further questions.

THE COURT: Mr. Feit?

REDIRECT EXAMINATION

BY MR. FEIT:

Q Mr. Haggerty, I believe you stated when I asked you whether or not any special efforts were made to attempt to reach black persons in the community, you indicated that you would do this by contacting --

A By sending them forms. We send them -- I don't know whether they are black people or white people. I send them to the district where I think there is 75 percent black people. I know pretty well all these wards in Albany, and I know just where they lay, like Arbor Hill, South End, Sheridan Avenue, and all them wards like that, and I specify to these people downstairs to send

forms out to these people.

Q And do you have any idea of the rate of return in those districts compared to other districts?

A Very poor, very poor.

Q It's very poor?

A Yes. As I said, them people all work; they are out working; they can't lose the time; they got jobs; they got children. Some of them don't even answer. Some of them do, and they tell you they got three, four children and they can't.

Q One thing wasn't clear to me. If somebody is qualified to be exempt and wishes to be exempt, you dismiss them; right?

A If they got an exemption --

THE COURT: If they have an exemption under the law, as I understand it.

THE WITNESS: Yes.

BY MR. FEIT:

Q Do you also exempt or disallow persons who do not qualify for exemptions under the statute but who otherwise indicate they would prefer not to serve?

That's right.

MR. FEIT: You do. That's all I have, your

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Honor.

BY THE COURT:

Q Let me ask you so I am clear in this now, how long have you been the Commissioner of Jurors?

A Well, it will be two years this May coming.

Q And living in the community, my recollection is that you serve on the Common Council of the City of Albany; is that correct?

A Yes.

Q Representing what ward?

A The Sixth Ward, over on Sheridan Avenue, Gander Bay, whatever you want to call it.

Q You are familiar with your own constituents within that ward?

A Yes.

Q Has it been your practice since becoming Commissioner of Jurors to make an extra effort to forward questionnaires to those names and addresses set forth in -- I assume you use what, the enrollment books?

A Yes.

Q You send questionnaires, perhaps a greater number than otherwise throughout the county, to those districts where from your experience there is a heavy concen-

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tration of black individuals; is that correct?

A Right.

Q And this practice you started when you became the
Commissioner; is that right?

A That is right.

Q Based upon your own personal experience as an official
in the City of Albany?

A Right.

Q Other than the extra percentage, let us say, of
questionnaires sent into those particular districts,
has the office done anything further in that regard,
that is, to seek out black jurors?

A Only sending out the forms that I know where mostly
black people live.

Q All right. Would you provide this Court with a copy
of the form that is sent out?

A Yes.

Q Is this the form that has been sent out regularly?

A Yes. Do you want it now?

THE COURT: When you are through, I would
appreciate your returning to the courtroom with such
a form, yes.

Are you finished, gentlemen?

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MR. FEIT: Yes, I am finished with the witness.

THE COURT: Are you finished, Mr. Dwyer?

MR. DWYER: I just have one other question in reference to the exemptions.

RECROSS-EXAMINATION

BY MR. DWYER:

Q. In reference to a question asked you by Mr. Feit, as to an individual who returns a form to you and, though technically is not exempt, yet requests that he be exempt for the reason that he is a family man supporting children, would the granting or denial of his application so as not to serve be predicated on race?

A. No.

THE COURT: It is based on economic hardship set forth affirmatively in the return, I assume?

THE WITNESS: Yes, no matter who it is.

THE COURT: All right.

MR. DWYER: I have no further questions.

MR. FEIT: That's all.

THE COURT: Are you finished with this witness?

MR. FEIT: Yes, your Honor.

THE COURT: Thank you. And I would appreciate your returning the form to this Court now.

MR. DWYER: I would like to have a copy of that form, too, your Honor.

THE COURT: And bring three up, one for the People, one for the defense and one for the Court.

MR. FEIT: Thank you, Mr. Haggerty.

(Witness excused.)

THE COURT: Now, I am going to take a short recess in this matter while we take proof in another matter. It will be a short recess, gentlemen, about 15 minutes, so you can guide yourselves accordingly.

(Short recess.)

THE COURT: All right.

MR. FEIT: Your Honor, at this time I would like to call Dr. Harry Hamilton as a witness.

THE COURT: Very well. At this time the Court will hand to the counsel for the defendant and to the District Attorney a copy of the form which was given to this Court by the Commissioner of Jurors following his testimony.

MR. FEIT: Thank you.

HARRY HAMILTON,

called by the defendant, having been first duly sworn according to law, was examined and testified as follows:

AND THE NATURE OF DIRECT EXAMINATION

BY MR. FEIT:

Q Dr. Hamilton, would you state your address for the record, please.

A 5 Morningside Drive, Delmar, New York.

Q And what is the nature of your employment, Dr. Hamilton?

A I am an Associate Professor of Atmospheric Science at State University of New York, Albany.

Q And would you tell the Court the extent of your education.

A I have a Bachelor's, Master's and Doctor of Philosophy degrees; Doctor of Philosophy in meteorology.

Q Dr. Hamilton, are you affiliated with the NAACP, the National Association for the Advancement of Colored People?

A Yes, I am.

Q And what is the nature of your affiliation with that organization?

A At present I am president of the Albany branch of this

organization.

Q And for what period of time have you served as president?

A I have been president since December of 1968.

Q And are there other black organizations with which you are affiliated, either locally or statewide and internationally?

A I am the coordinator of the Albany Black Coalition which is an umbrella of about twenty black organizations in the City of Albany, and I am a member of the Urban League of Albany.

Q Now, in connection with your employment at State University, are you affiliated with or have you been affiliated with any programs that dealt with black students at the University?

A For one year I had an appointment in the Department of Afro-American Studies, and for three years I directed a program known as the Educational Opportunities Program which, while not a black program officially, has approximately 70 to 80 percent of its students black.

Q Dr. Hamilton, as a result of your affiliation with these black organizations, have you had opportunities to discuss the problems which concern and involve black

persons?

A Yes, a great deal of it.

Q Would it be fair to state that this is the primary function of the NAACP?

A Yes.

Q And to attempt to work towards a resolution of some of these problems?

A Correct. And both the national organization and the local organization have had a great deal to do with the legal process, not only working in general discrimination cases but in the legal end of things, not restricted either to civil or criminal, but both cases.

Q Dr. Hamilton, I believe you stated that you have been the president of the Albany County -- or is it the City of Albany NAACP chapter?

A It is not specified. Our membership is beyond even the county, although the bulk are within the City, the bulk of our members are within the City.

Q Dr. Hamilton, in that capacity are you aware of any efforts that have been made in Albany County to attempt to obtain greater participation by black persons on jury panels in court cases?

A None at all.

Q Have you ever been contacted by the Commissioner of
A Jurors of Albany County in this regard?

A No.

Q Now, Dr. Hamilton, did you have a telephone conversation
A with me earlier today?

A Yes, I did.

Q And in that conversation did I mention some figures

A which related to the composition of the panel of jurors
in this particular case?

A Yes, you did.

Q And did I mention that, according to a list that I had,
there were 65 persons on this panel and that 50 of the
A 65 persons were from the City of Albany?

A Yes, those are the figures you mentioned.

Q Did I also say that, according to my own personal
observations, I found that there was one black person
on this jury?

A Yes, one out of the 65, you said.

Q Now, Dr. Hamilton, have you calculated what the
probability of this happening would be -- in other
words, one black person out of 65 persons -- and can
you state to the Court what your calculations in that
regard are?

MR. DWYER: If it please the Court, I am going to object to this on the grounds that if this witness can give testimony in reference to his own calculations as an individual, certainly he is entitled to do so if the Court wishes to accept it, but I object as calling for a conclusion, on the grounds that this witness is not an expert in this field. But he can certainly do it individually if the Court will accept it as such, and I have no argument with that, but I would object on the grounds that no proper foundation for any expertise has been laid in reference to this witness.

THE COURT: And I am going to sustain the objection at this time, and particularly as to the form of that question. I am not precluding your general line, however.

BY MR. FEIT:

Q Dr. Hamilton, can you calculate for the Court what the probability is of this situation occurring out of a random sample of people? Can you do that and explain to the Court the calculation?

A Yes, I can. In my work in atmospheric science we often have to deal in statistics, so I have had a number of courses in statistics and have used them. And using

this -- what I will explain as generally accepted theory, which has been corroborated by one of the outstanding statisticians at State University -- it is known as the binomial theorem and binomial distribution, and the basis on which I did this was to take the 1970 U.S. Census Bureau figures, which indicate that there are 13,975 blacks residing in the City of Albany and that the City total population is 115,781 --

THE COURT: What was that other figure?

MR. DWYER: What was that figure?

THE WITNESS: 13,975 blacks, 115,781 total, giving a percentage of blacks of 12 percent. And that is within the City of Albany; that is not the County figure; that is the City of Albany. And I did make one assumption that was not verified. I will indicate that this is an assumption, that the one black juror was from the City of Albany. And the equation is such that you take the 1 over the sample size and subtract the percentage of blacks in the total population and then divide by a fraction which is composed of the percentage in the general population, times 1 minus that, divided by the sample size, and our sample size is 50 people, the 50 persons from the City of Albany. And the number

that this equation generates is 2.17, and comparing this with general statistical tables, it means that there is a four percent chance that these 50 people were randomly selected. In other words, if out of the total population of the City of Albany 50 people were randomly taken a large number of times, then on only 4 out of 100 of those times would you find only one black out of the 50 persons.

Q Dr. Hamilton, do people who do statistical type of work have a certain point at which they determine that certain findings are statistically significant?

A Yes.

Q And is the calculation that you have just discussed and the conclusion that you have reached one that would be statistically significant? And if so, would you explain that to the Court.

A There are a number of different levels of significance, as they are called. One of them is taken as 5 percent. This is perhaps the most common value. If a situation is significant at the 5 percent level, it is generally conceded that it was clearly non-random. In other words, if over a large number of trials only 5 out of 100 cases would turn out in this fashion, it is generally

conceded that this particular example was not random because the percentage is so low.

Q Is there a term that statisticians use sometimes which they refer to as biased; that this would show somehow that -- again using the technical language of statistics, that there was a non-random and biased -- some explanation other than randomization to account for this result?

A Yes. In general they would -- they would not say that -- their expression would not be that it is biased. That's their inference. Their statement would be that it is clearly -- it is highly unlikely that it is random.

Q Dr. Hamilton, earlier we have had the testimony of Commissioner Haggerty, who is the Commissioner of Jurors for Albany County, and in his testimony he indicated that there were three primary sources from which the Commissioner of Jurors drew upon to obtain names of possible jurors, and one of these was the telephone directory. Do you have an opinion based upon your experience in dealing with problems of black persons in your capacity as the president of the Albany Chapter of the NAACP and based upon your other experiences as a black person with respect to the

extent to which black persons may or may not have their telephone numbers listed?

MR. DWYER: I am going to object to the question as no proper foundation, calling for a conclusion on the part of the witness and calling for expertise he does not possess.

THE COURT: I am going to overrule the objection. There isn't any jury here.

MR. DWYER: I understand that, but I am making this for the record. If the Court wishes to hear the answer, I have no objection, but on the record I am making the objection.

BY MR. FEIT:

Q You may answer the question, Dr. Hamilton.

A It has been my personal experience and my information in talking with other people that there is a higher incidence of unlisted telephone numbers amongst black persons than amongst whites.

Q How can you account for that, if you have an opinion or knowledge of that? Upon what do you support your statement?

MR. DWYER: I am going to object to that also; no foundation, calling --

THE COURT: I am going to sustain the objection in view of the preface by the witness. And, for the record, there isn't any jury here, but I will attach the appropriate --

MR. DWYER: It is a hearsay conclusion.

THE COURT: Exactly. I will attach the appropriate weight to the answer, for the record. All right, go ahead. And I sustained the recent objection.

MR. FEIT: Your Honor, my understanding of the manner in which to qualify someone as an expert is that this person has certain knowledge and information which is not readily available and normally available to the public at large. I think Dr. Hamilton, based upon his background and experience, should be permitted to testify on some of these issues as an expert.

THE COURT: I don't agree that you have laid a proper foundation at this juncture as to this witness testifying as to the telephone directory propensities of a particular segment of the population. I am going to sustain the objection at this juncture.

BY MR. FEIT:

Q Dr. Hamilton, in your experience as the president of the NAACP, have you had occasion to discuss with others

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the general situation concerning the lack of black persons on trial juries in Albany County?

A Yes, I have.

MR. DWYER: I object as calling for a hearsay answer and conclusion.

MR. FEIT: I asked him if he --

THE COURT: I am going to let the witness answer.

THE WITNESS: Yes, I have.

BY MR. FEIT:

Q Could you describe for the Court the nature of your involvement in those discussions, if there was more than one?

MR. DWYER: The same objection, your Honor.

THE COURT: I am going to sustain the objection to that question in that form.

Let me ask you, Dr. Hamilton, in your capacity as president of the Albany Chapter of the NAACP, have you participated in any study of the trial jury situation in Albany County?

THE WITNESS: No, I have not.

THE COURT: All right.

BY MR. FEIT:

Q Dr. Hamilton, I believe that you testified that you live in Delmar?

A Yes.

Q Which is in Albany County?

A Yes, it is.

Q How long have you lived at your present address?

A For seven years.

Q And before that were you a resident of Albany County?

A For one year in the City of Albany.

Q And during that time have you ever received a questionnaire from the Commissioner of Jurors to sit on a jury?

A No, I have not.

Q Dr. Hamilton, are you married?

A Yes, I am.

Q To your knowledge, has your wife ever received a questionnaire to serve on a jury in Albany County?

A No, she has not.

Q Is your wife a black person?

A Yes, she is.

MR. FEIT: I have no further questions.

THE COURT: Would you like to serve on juries

(Harry Hamilton, for Defendant, By Court)

A 64

in this County?

THE WITNESS: Yes, I would.

THE COURT: This Court will direct the Commissioner of Jurors to see that you are sent a questionnaire.

MR. DWYER: And his wife also.

THE COURT: Yes, Mr. Dwyer.

Now, let me ask you, Doctor, --

MR. DWYER: I would like to examine the witness. I know the Court would, but I would, too.

THE COURT: I understand that. I just wanted to clarify one matter, if I might.

MR. DWYER: All right.

BY THE COURT:

Q You gave certain statistics applying to this 50-to-1 city population. Do you have a similar breakdown for the county level? That would be 1 to 65, and with a 285,000-some-odd-hundred total population of the county.

A I have not worked it out. I can. I did not.

Q Would you?

A Yes.

Q Would you like a short recess? Would it be more comfortable to sit at a table to do it?

(Harry Hamilton, for Defendant, By C. E.)

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A Yes. It will only take five minutes.

THE COURT: We will take a five-minute recess.

(Short recess.)

THE COURT: Resume the stand, Doctor. You are still under oath.

The record will indicate the presence of the defendant and his counsel, and Mr. Dwyer for the People.

BY THE COURT:

Q Proceed. Did you work that out?

A Yes, I did.

Q What is the answer?

A I must tell you one assumption that I made at the beginning and that is that there are approximately 3,000 blacks residing outside of the City of Albany, giving a total Albany County black population of 17,000, rounded off, out of a total county population of 286,742, and the probability that one out of 65 persons is approximately 10 percent.

Q And what is the percentage of random selection?

A That would be it.

Q Oh, 10 percent is the random selection?

A No. I will put it this way: Only 10 percent of the times out of randomly selected would you end up with

only one out of 65.

Q All right, very good, thank you. Now, what does that mean, if anything?

A That is less significant than the numbers I gave you before.

Q That's obvious. I figured it out myself. My recollection is that you indicated that 5 percent would be highly unlikely.

A Right.

Q Now, is there a corresponding phrase for 10 percent, or not?

A In a great deal of -- and this is the only way I can phrase it: In a great deal of science, anything that is significant at the 10 percent level is considered non-random.

Q Instead of highly unlikely, it would not be considered random; is that a fair statement, Doctor?

A Yes.

Q Your conclusions are based wholly and solely on statistics?

A Yes.

THE COURT: Mr. Dwyer?

CROSS-EXAMINATION

BY MR. DWYER:

Q Doctor, have you as head of the NAACP contacted the Commissioner of Jurors here in Albany County in reference to jury selection?

A No, I have not.

Q Now, Doctor, the statistics you gave us are based upon the census; is that correct?

A The 1970 census.

Q And your statistics in no way reflect the number of black people who are registered voters here in the County of Albany; is that correct?

A That is correct.

Q And assuming, Doctor, that a figure less than -- I believe you said the total number of blacks roughly in the County would be about 17,000?

A Correct.

Q If a number less than 17,000 were registered voters, then these statistics would not be valid, the conclusions you draw --

MR. FEIT: Your Honor, I am going to object to that question as to its form.

MR. DWYER: All right, I will rephrase the

(Harry Hamilton, for Defendant, Cross)

A 68

question.

Q Assuming, Doctor, that a figure less than 17,000 were involved, then the ultimate conclusion you reached would be totally different than the 10 percent?

MR. FEIT: Your Honor, I am going to object. I think for purposes of clarification the figures that are being used here are total population and are not broken down to indicate the age, which would further indicate whether or not someone was a voter. I think that that should be clarified.

THE COURT: Basically, I think, Doctor, if you had different figures you would get a different result; isn't that the fact?

THE WITNESS: Yes. I just wanted to indicate that if we changed the 17,000 we would also have to change the other number.

THE COURT: All right. I am aware of that.

BY MR. DWYER:

Q Naturally so. Have you ever witnessed yourself, Doctor, the drawing of juror names or observed the selections by the Commissioner of Jurors as people who would be designated to serve here in the County of Albany?

A No, I have not.

Q Do you have any personal knowledge of any systematic exclusion by the Commissioner of Jurors here in Albany County of black people?

A From my understanding of the methods used, it clearly excludes blacks.

Q Well, Doctor, I am going to move to strike that answer as not responsive. I understand your answer, but my question is, of your own personal knowledge do you have --

THE COURT: I will strike the answer as not responsive; and repeat the question.

MR. DWYER: All right.

Q Do you have personal knowledge of systematic exclusion of black people from the voting ranks here in the County of Albany?

MR. FEIT: I am going to object to the question. I think it's confusing to the witness. What personal knowledge means to one person may not mean the same thing to another person.

THE COURT: If that's the basis of your objection, I am going to overrule it.

A May I ask for further -- may I ask for clarification?

(Harry Hamilton, for Defendant, Cross)

1) 70

Q Surely.

A Do you mean, do I have any knowledge that potential jurors are identified by race and then excluded? Excluded by race by the Commissioner here in the County of Albany.

A No, I do not.

MR. DWYER: I have no further questions.

BY THE COURT:

Q I have some questions, Doctor. Are you familiar with the manner in which jurors are selected in this County?

A I have not seen a written description of the method.

Q And my recollection is that earlier you told me you had not made any study of this particular matter.

A That is correct.

Q By the same token, I gather that it is your feeling that there is an exclusion of blacks from the jury panels in this County; is that a fair statement?

A Yes, it is.

Q That's based in part on conversation and in part on -- I don't know; what is it please?

A I can indicate it's based upon four factors.

Q Fine.

A One is conversations with other persons; second is

observation of a small number of trials.

Q Where, Doctor?

A Both in this court and in Police Court, if they are the same panel. A third method is a study that I did see that was taken approximately seven years ago; and, fourthly, my understanding of the procedures that are used. What I have been told the procedures are leads me to believe -- I will put it this way: If the procedures are as I have been told, then I think that I can present indications that it would --

Q All right, let me ask you this: If the procedures used follow substantially the statutory requirements of the laws of the State of New York, then in that event, Doctor, would it be fair to say that your complaint is not so much with the selection of juries per se in this County, but rather with the statute itself? Do you understand what I am saying?

A Yes, I do.

Q All right.

A With that assumption, that is correct.

THE COURT: I have no further questions.

MR. FEIT: I have no further questions.

THE COURT: All right. Thank you, Doctor.

(Witness excused.)

MR. FEIT: We have no further witnesses,
your Honor.

THE COURT: All right. Mr. Dwyer.

MR. DWYER: The People rest.

THE COURT: The People rest. All right,
decision reserved.

MR. DWYER: I would like to point out to
the Court that in view of the fact we have received
this form from the Commissioner of Jurors -- the Court
has one, Mr. Feit and myself -- that the form of
questionnaire is set out in the Judiciary Law in Section
661.

THE COURT: Is it identical? I haven't
examined it. I will. If you have, say so. If not,
I will examine it myself.

MR. DWYER: Well, I say it is, except in
the Judiciary Law the record of jury service is
indicated on the form, whereas here I don't believe it
is. But as far as the questionnaire, it is the same.

THE COURT: All right, I will examine it.
Gentlemen, all things being equal, I will
endeavor to have a decision for you by Friday noon,

which you can pick up at my chambers. In the event that the challenge is sustained, this matter will then have to await the selection of another panel. In the event the challenge is denied, the defendant will be ready to proceed to trial on February 20th, at 11 a.m. You may pick up the decision at noon, Friday. That's the 16th.

MR. FEIT: Yes, your Honor.

THE COURT: And I would expect you to be guided accordingly. Agreed?

MR. FEIT: Agreed, your Honor.

THE COURT: Agreed, Mr. Dwyer?

MR. DWYER: Yes, sir.

THE COURT: Court is adjourned until 10 o'clock tomorrow morning.

(Whereupon the proceedings in the above matter were adjourned until Tuesday, February 20, 1973, at 11 a.m.)

(The following is the decision of the Court on the challenge to the jury panel by defendant's counsel:)

A 74

CLYNE, J.:

The defendant challenges the panel of jurors drawn in the above entitled action pursuant to Section 270.10 of the Criminal Procedure Law on the grounds that black persons, culturally different, and persons of lower economic status, as well as persons of lower ages, have been systematically excluded from and are systematically under-represented in said panel by virtue of the fact that the source of names consulted by the Commissioner of Jurors results in the disproportionate exclusion of identifiable racial minorities and lower-income citizens and produces a panel which is not representative of the community at large, and particularly not of the black community of Albany County, in violation of the defendant's constitutional rights.

The moving papers contain no factual allegations. The People in their answering affidavit deny the conclusory allegations of the defendant. This Court granted a hearing in order to provide the defendant an opportunity to develop factual allegations in support of his challenge to the panel.

The defendant called Richard Haggerty, Commissioner of Jurors for the County of Albany, who

testified concerning the manner in which trial jurors in this county are selected. A capsule summary of the Commissioner's testimony establishes that such selection is in accordance with the pertinent provisions of the Judiciary Law. The Commissioner testified that he has made a conscious effort to increase the number of black jurors by a concentration of mailing of questionnaires in election districts within the City of Albany known to him to be heavily populated by blacks. There is absolutely no inference from the testimony of the Commissioner that there is any deliberate exclusion of persons by reason of race or economic status. If anything, there is an extra effort on the part of the Commissioner to increase the number of potential black jurors.

The only other witness called by the defendant was one Harry Hamilton, a professor at State University at Albany and the president of the Albany branch of the National Association for the Advancement of Colored People, who testified that the existence of only one black juror on this panel of 65 jurors constituted such a mathematical disparity as to make it unlikely that the selection was random.

In order to sustain a claim of an illegally

constituted jury, it is essential that intentional and systematic discrimination must be proved and a showing of mathematical disparity, without more, is insufficient to meet this burden. (People v. Chestnut, 26 N.Y. 2d 481; People v. Horton, 18 N.Y. 2d 355; certiorari denied, 387 U.S. 934).

On the facts before this Court, the defendant has failed to establish his claim of an illegally constituted jury and, consequently, the challenge to the panel is denied.

Dated: February 16, 1973
Albany, New York

PEOPLE v. ANDERSON

Cite as 348 N.Y.S.2d 227

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change of venue. Mindful of the fact that we live in a mobile society, and a 32-month delay exists in Suffolk County, compared to only six months in St. Lawrence County, we cannot say that Special Term abused its discretion in denying defendant's motion.

Order affirmed, with costs.

**42 A.D.2d 1007**

The PEOPLE of the State of New York, Respondent, v. Allen M. ANDERSON, Appellant.

Supreme Court, Appellate Division, Third Department.

Oct. 18, 1973.

Defendant was convicted in the Albany County Court of second-degree assault and he appealed. The Supreme Court, Appellate Division, held that defendant failed to show that black persons and other distinct classes of which defendant was a member had been systematically excluded from jury panel or that defendant was prejudiced in any manner by panel that was drawn.

Affirmed.

Jury \Leftrightarrow 33(1)

Defendant in assault prosecution failed to show that black persons and other distinct classes of which defendant was a member had been systematically excluded from jury panel or that defendant was prejudiced in any manner by panel that was drawn. CPL 270.10.

Arnold W. Proskin, Albany Co. Dist. Atty., Albany (John A. Williamson, Jr., Albany, of counsel), for respondent.

Michael Lynch, Albany, for appellant.

Before GREENBLOTT, J. P., and COOKE, SWEENEY, KANE and MAIN, JJ.

MEMORANDUM DECISION.

Appeal from a judgment of the County Court of Albany County, rendered March 8, 1973, upon a verdict convicting defendant of two counts of assault in the second degree.

Defendant was a passenger in an automobile owned by his wife and operated by a female companion on Route 7 in Albany County, at about 3:45 A.M. on October 7, 1972, when the driver was stopped by

two State Troopers and requested to produce her license. Upon her failure to do so, defendant was arrested for permitting unlicensed operation of a vehicle. The ensuing conversation advanced to an altercation which required hospital treatment for defendant and both troopers.

On October 19, 1972 defendant was indicted for two counts of assault in the second degree, and thereafter he was found guilty on both counts, and sentenced to a five-year term of imprisonment on each count, the sentences to run concurrently.

Prior to trial, however, defendant challenged the jury panel (CPL 270.10) on the ground that black persons, and other distinct classes of which defendant was a member, had been systematically excluded from the panel. After a hearing, the trial court denied the challenge. Although the hearing showed certain irregularities in the system as it functioned in Albany County, there was insufficient proof of systematic exclusion of blacks and others from jury service. A witness for defendant admitted that he had no personal knowledge of systematic exclusion of potential black jurors. From an examination of this record, it is evident that defendant has failed to meet the required burden of proof in that he has not shown that a distinct attitudinal class of persons was systematically excluded or that he was prejudiced in any manner by the panel that was drawn (People v. Chestnut, 26 N.Y.2d 481, 487, 311 N.Y.S.2d 853, 857, 260 N.E.2d 501, 504; People v. McDowell, 35 A.D.2d 611, 312 N.Y.S.2d 477, mod. on other grounds, 28 N.Y.2d 373, 321 N.Y.S.2d 894, 270 N.E.2d 716; People v. Pulliam, 28 A.D.2d 786, 281 N.Y.S.2d 137).

The other grounds for reversal urged by defendant have no basis in fact or law.

Judgment affirmed.



42 A.D.2d 1010

Claim of Cecelia STEINMETZ, Respondent, v. V & E DRESS, INC., et al., Appellants, and Uninsured Employers' Fund, Respondent, Workmen's Compensation Board, Respondent.

Supreme Court, Appellate Division, Third Department.

Oct. 18, 1973.

Appeal from decision of Workmen's Compensation Board which held, among other things, that an attempt at cancellation by the carrier was ineffective. The Supreme Court, Appellate Division, held

State of New York

Court of Appeals

BEFORE: HON. STANLEY H. FULD, Chief Judge

THE PEOPLE OF THE STATE OF NEW YORK

Respondent,

against

ALLEN M. ANDERSON,
Defendant-Appellant.

CERTIFICATE
DENYING
LEAVE

I, STANLEY H. FULD, Chief Judge of the Court of Appeals of the State of New York, do hereby certify that, upon application timely made by the above-named appellant for a certificate pursuant to CPL 460.20 and upon the record and proceedings herein,* there is no question of law presented which ought to be reviewed by the Court of Appeals and permission to appeal is hereby denied.

Dated New York , New York
December 18 , 19 73.

Stanley H. Fuld
Chief Judge

EXPLANATION OF CENSUS CALCULATIONS

The following figures have been extracted from the official United States Census Reports for 1970:

A. Regarding Racial Discrimination:

The percentage of Albany County's population 21 and over which is black is 4.4%.

Albany County total population - 286,742 (Table 10)

County total population 21 and over - 180,503 (Table 35)
County black population 21 and over - 7,869 (Table 35)

Black people 21 and over comprise 4.4% ($7,869/180,503$) of the total population 21 and over and thus presumptively eligible for jury duty.

B. Regarding Exclusion of Students:

The percentage of Albany County's population 21 and over which consists of students is 4.3%

Albany County total population 21 and over - 180,503 (Table 35)
Total Albany County college enrollment - 15,361 (Table 120)

(The published Census Reports for 1970 cannot be used to determine the exact number of students in Albany County who are 21 and over. Statewide statistics are available, however, to estimate the number of students in Albany County 21 and over.)

Total New York State college enrollment - 659,288 (Table 62)
Number of students 21 and over - 332,609 (Table 146)

In New York State, 50.45% ($332,609/659,288$) of the total college enrollment is 21 and over.

Applying 50.45% to the 15,361 college students enrolled in Albany County results in the estimate that 7,750 students in Albany County are 21 and over.

Students 21 and over can be estimated to comprise 4.3%
(7,750/180,503) of the total Albany County population 21 and
over, and thus presumptively eligible for jury duty.

(Table numbers used in Appendix D refer to the tables with
corresponding numbers in United States Census Reports for 1970,
Vol. 1: Characteristics of the Population, Part 34: New York.)

1 Q. I see. Well, if you're going down a page of this
2 (indicating) directory, would you put your finger on a
3 name and take it or read down the list and decide to
4 take one?

5 A. Take one name down -- go down the list; we'll say
6 here is Mr. Anderson -- we'll send you an application
7 and we go down a few more and we don't take all of the
8 same names -- we'll take Adams or Anderson and Buckley
9 or any of those all of the way down.

10 Q. In looking at these lists in this 1969 Colonie -
11 Bethlehem - Guilderland City Directory, I note that you
12 would have a name such as -- I'm on page 104 -- David
13 B-U-L-M-A-N and at the top and in parenthesis, it says,
14 "Mary H".

15 A. That's his wife.

16 Q. When you pick out a name at random, would you just take
17 and send it, say, to David Bulman, or one, also, to his
18 wife?

19 A. Sometimes -- not always.

20 Q. On what basis would you make your decision to send one
21 to each of them?

22 A. We want so many men and so many women on a jury; we
23 don't want all men or all women.

24 Q. Did there ever come a time when looking at random
25 through this book that you would find a name which would

1 indicate that there was a family having not only a husband
2 and wife but some children in the family?

3 A. They have to be over twenty-one.

4 Q. How do you ascertain that from this book?

5 A. They don't go into that book until twenty-one.

6 Q. Do you know this to be a fact?

7 A. That's a law -- anybody who votes gets in those
8 books, so they say -- I don't know; I have no facts
9 about it -- no.

10 Q. Have you ever remembered in looking through this book and
11 seeing a family named -- such as -- well, I happen to see
12 one Burgis on page 105 and they have Allen Burgis and they
13 have in parenthesis, Dorothy L., indicating the wife, as
14 you said --

15 A. Right.

16 Q. Do you know -- a little bit further, there's an entry
17 for Daniel F. Studt.

18 A. Student. We don't -- students, they can't come
19 out of school and serve until graduation from college;
20 if they're away, they can't come and we can't take them.
21 We're only filling up the file with people who can't
22 serve.

23 Q. And, suppose, you hit another name, for instance, on
24 page 105, there's an entry by the name of Burgart,
25 Billie, Studt.

A. Student.

1 Q. But, this name does not indicate it as part of any
2 family; it's just one entry, Bill Burgart and another
3 entry, Donald, followed by Cir -- parend APT one; would
4 you also exclude a name -- in other words, because it
5 appears that person is a student?

6 A. Well, that first one was a student but I wouldn't
7 know of the second unless we look it up in the back of
8 the book; there's an abbreviation.

9 Q. Maybe, you could help me find an abbreviation very
10 quickly.

11 A. Burger -- Burgard -- BER.

12 Q. Could you find the abbreviation -- what that means?

13 A. Donald -- that wouldn't be --

14 Q. Well, you have looked at that entry, now?

15 A. Yes, I know I did but I may -- they didn't take that
16 name -- we would not know what it was for.

17 Q. The first entry indicated a student. Would you also check
18 the second entry because it seems to be related to a
19 student in some way?

20 A. I don't believe we would -- we took it and send it
21 and we would see what it would be; I know they're in
22 here; they were in some of the books.

23 Q. Let me ask you a question, generally, Mrs. Benson: If
24 you find an entry for a student, and an entry
25 indicating the student was married -- in other words,

1 had a wife or the wife was a student and the husband was
2 there, would you exclude both parties because one of them
3 was a student?

4 A. Well, I don't know about that; I could not say because
5 if it's a student, we skip it because some times the
6 student's wife is a student, too -- you know, they're
7 away and get married and they're together.

8 Q. Could you tell me any other use you make of the -- the
9 telephone directory, you told me?

10 A. Oh, yes.

11 Q. Let's stick with the City Directory; any other system
12 that you use in getting the names, in particular, the
13 City Directory -- in other words, what sort of rule of
14 thumb you use in picking out names, other than going
15 through at random?

16 A. We go through, as I said, at random and take some
17 out of the "A's" and "B's"; they don't want all "A's"
18 and you go through the alphabet.

19 Q. How often do you do that?

20 A. Well, when our list seems to get down; we're
21 supposed to have ten thousand in the drawer at all
22 times.

23 Q. How many do you have in it?

24 A. Eight thousand and something; the year has gone by
25 and we start in the Fall to send out the applications

STATE OF NEW YORK
COUNTY OF ALBANY

COUNTY COURT

THE PEOPLE OF THE STATE OF NEW YORK

-against-

ALLEN MORRIS ANDERSON a/k/a
ALLEN STROTHER,
Defendant.

CHALLENGE TO
JURY PANEL

The above named defendant hereby challenges the panel of jurors drawn in the above entitled action, pursuant to Section 270.10 of the Criminal Procedure Law and moves the Court to order the preparation of a new jury list on the grounds that black persons, culturally different, and persons of lower economic status as well as persons of lower ages have been systematically excluded and are substantially under-represented in said panel, by virtue of the fact that the source of names consulted by the Commissioner results in the disproportionate exclusion of identifiable racial minorities and lower income citizens and produces a panel which is not representative of the community at large, and particularly not of the black community of Albany County, in violation of the due process and equal protection clauses of the Fourteenth Amendment to the United States Constitution.

The Supreme Court of the United States has held that a prima facie case of purposeful discrimination can be proven by showing that a particular class of people is substantially underrepresented on the list of prospective jurors and that each prospective juror is identifiable as a member of the underrepresented group, thereby

providing the opportunity for discrimination. See Whitus v. Georgia, 346 U.S. at 551-552; Avery v. Georgia, 345 U.S. at 560-561; Norris v. Alabama, 294 U.S. 587, 594-595, (1935). The combination of substantial underrepresentation and opportunity to discriminate which has been condemned by the Federal Courts is precisely the factual situation of the present challenge. Under circumstances such as these, the defendant need not prove some particular act of discrimination by some particular officer responsible for the selection of the jury; a prima facie case does not require so much. See Avery v. Georgia, 345 U.S. at 562-563 (1952).

In the case of Bokulich v. Jury Commission of Green County (298 F. Supp. 181 (1968)), a three judge district court based its decision that Negroes had been discriminatorily excluded from consideration for jury service upon a finding that the jury commissioners had failed to carry out certain affirmative duties that are necessary to a constitutionally secure system of juror selection. In that case it was found that the commissioner used voter registration lists, telephone directories, and personal contacts to obtain names for the list of jurors, but that, despite these efforts, the numbers of Negroes on the list of prospective jurors was disproportionately small as compared to the population of the county. The court held that there had been an exclusion of Negroes from consideration for jury service, and that this exclusion was none the less unconstitutional because it had resulted from a failure to seek out qualified Negroes than it would have been in the event that evil motive or lack of good faith on the part of the commissioner had been proved.

The Supreme Court of the United States has affirmed Bokulich (Carter v. Greene County, 396 U.S. 320 (1970)), apparently agreeing that the lack of any meaningful procedure by which the names of Negroes would be fed into the jury selection procedure was sufficient, when considered along with the obvious underrepresentation of Negroes on the list of jurors, to make out a prima facie case of discrimination.

The evidence to be considered in the present challenge to the juror selection process is similar to the evidence which the court found convincing in Carter. Both cases involve the use of only some of the statutorily suggested sources of information in the compilation of the jury list. (See Section 820.4 of the Rules of the 3rd Department on the Administration of the Jury System.) The statistical disparity in the number of young adults and black persons placed on the jury list is indicative of either intentional, purposeful discrimination or the compilation of the lists of jurors from a source which does not reasonably reflect a cross-section of the population suitable for jury duty. The latter practice is to be condemned as vigorously as the first. See, Carter v. Greene County, 396 U.S. 320, 132-333 (1970); Brown v. Allen, 344 U.S. 443, 474 (1953).

This Court should, therefore, dismiss the present panel of jurors and postpone the trial of the defendant until such time as a properly selected panel can be drawn.

Respectfully Submitted,

FEIT, SCHLENKER & KATZ
Rv: Michael A. Feit

Albany, New York 12210
(518) 463-4473

Time for argument:

TO BE ARGUED BY
MICHAEL LYNCH

NEW YORK SUPREME COURT
APPELLATE DIVISION - THIRD DEPARTMENT

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent

-against-

ALLEN M. ANDERSON,
Appellant

BRIEF AND APPENDIX FOR
DEFENDANT - APPELLANT

MICHAEL LYNCH
Attorney for Defendant-Appellant
38 Chapel Street
Albany, New York 12207
(518) 434-0153

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STATEMENT UNDER CPLR 5531

STATE OF NEW YORK
COUNTY COURT

COUNTY OF ALBANY

THE PEOPLE OF THE STATE OF NEW YORK,
Respondent

-against-

ALLEN M. ANDERSON,
Defendant-Appellant

1. The index number of the case in the court below is 2157-73.
2. The full names of the original parties are as stated above. There has been no change in the parties.
3. The action was commenced in Albany County Court.
4. The action was commenced by an indictment returned October 19, 1972. Trial began on February 22, 1973. Appellant was sentenced on March 8, 1973.
5. Appellant was charged with two violations of §120.05(3) of the Penal Law of the State of New York.
6. The appeal is from a judgment of conviction of two violations of §120.05(3) of the Penal Law of the State of New York and from the sentence imposed therefor and from each and every order entered therein.
7. The appeal is taken by the appendix method.

PRELIMINARY STATEMENT

Defendant, Allen Anderson, appeals from a judgment of the County Court, Albany County, rendered March 8, 1973, sentencing him to two concurrent terms of five years each, upon his conviction after trial of the crimes of assault in the second degree (two counts). Defendant is presently serving his sentence in Great Meadows Correctional Facility.

QUESTIONS PRESENTED

1. Whether defendant's challenge to the jury panel should have been sustained.
2. Whether defendant's constitutional right to a trial by an impartial jury of his peers was denied.
3. Whether the courts charge to the jury was proper.
4. Whether defendant's sentence was harsh or excessive.

STATEMENT OF FACTS

Defendant was a passenger in an automobile on Route 7 in Albany County at approximately 3:45 AM on October 7, 1972. Two State Troopers approached the car and upon the failure of the person who had been in the drivers seat to produce a drivers license defendant was arrested and asked to put his hands on the car for the purpose of being searched. A fight ensued and defendant and the two Troopers were injured. Defendant was charged with 2 counts of second degree assault.

OPINION OF THE COURT

The defendant was found guilty after a jury trial of violating section 120.05(3) of the New York State Penal Law (second degree assault), two counts, and was sentenced by the Court to two concurrent terms of five years each.

POINT I

DEFENDANT'S CHALLENGE TO THE JURY PANEL SHOULD HAVE BEEN SUSTAINED ON THE GROUND THAT THERE HAS BEEN SUCH A DEPARTURE FROM THE REQUIREMENTS OF THE JUDICIARY LAW IN THE DRAWING OF THE PANEL AS TO RESULT IN SUBSTANTIAL PREJUDICE TO THE DEFENDANT.

Section 665 of the New York State Judiciary Law enumerates the "only" classes of persons, who, although qualified, are entitled to exemption from service as jurors upon claiming exemption therefrom. The word "only" indicates that the legislature intended this to be an exclusive list.

Section 664 of said law lists those persons who are disqualified to serve as jurors and section 665(a) lists those persons who are ineligible to serve as jurors.

Mr. Haggerty, the Albany County Commissioner of Jurors, testified that students as a class are automatically exempted from jury duty, (A 26) and black persons are exempted on request, regardless of whether they qualify for an exemption under the law or not (A 27). He further testified that judgment debtors are excluded (A 25). None of these classes of persons (students, blacks, and judgment debtors) is included in the list of classes of persons disqualified, ineligible or exempt from jury duty under sections 664, 665, or 665(a) and consequently their exemption was clearly illegal.

Section 666 of said Judiciary Law provides that in order

to claim an exemption, an entitled person must furnish an affidavit to the Commission of Jurors stating the facts entitling the applicant to exemption.

There was no evidence that the affidavits required by section 666 were ever submitted by the exempted individuals. Rather, Mr. Haggerty testified that students are exempted merely on the basis of their statement that they are students (A 26) and blacks are exempted on request (A 27). He further testified that judgment debtors are automatically excluded (A 25).

Section 678 of said Judiciary Law provides that, upon application of a prospective juror, a judge may excuse such juror from jury duty for reasons of hardship.

In excusing the prospective jurors in question the Commissioner of Jurors assumed a power which is delegated exclusively to the court under section 678 of the Judiciary Law.

If, as indicated by Mr. Haggerty, many black people claim that jury duty would create substantial financial hardships, then the court and only the court may excuse such jurors under section 678 of the New York State Judiciary Law.

The exclusion of these groups from service on juries by means of the granting of illegal exemptions was an intentional and systematic departure from the requirements of the Judiciary Law. These groups are the groups most closely related to appellant in age, culture and social and economic status. Their exclusion substantially prejudiced appellant's right to

an impartial, unbiased jury, composed of his peers and representative of the community as a whole. (Smith v. Texas, 311 U. S. 128).

POINT II

THE EXEMPTION OF BLACKS, STUDENTS AND JUDGMENT DEBTORS FROM JURY DUTY DEPRIVED APPELLANT OF HIS CONSTITUTIONAL RIGHT TO A TRIAL BY AN IMPARTIAL JURY OF HIS PEERS.

The sixth amendment to the United States Constitution assures a defendant in a criminal action the right to a trial by an impartial jury.

Article I, section 1, of the New York State Constitution provides that "no member of this State shall be...deprived of any of the rights or privileges secured to any citizen thereof, unless by...the judgment of his peers."

A. Exclusion of blacks, students and judgment debtors

Webster's Third New International Dictionary defines "peer" as follows:

Peer: one that is of the same or equal standing (as in law rank, quality, age, ability) with another.

Appellant is a poor, young (30 year old), black person. The Albany County Commissioner of Jurors testified that students and blacks and judgment debtors are exempted from Jury Duty (A 26, A 25, A27). In People v. Marr, 67 Misc 2d 113, the court noted that "since most students fall in the lower age brackets, it seems reasonable to conclude that young adults in the age group 21 to 32 would be the group most adversely affected by this exclusion." Further, it can be assumed that

most of whom debtors would fall in the lower income bracket.

Consequently, blacks, young people, and poor people, the classes of people most closely related to appellant, have been systematically excluded from jury duty. This constitutes a denial to defendant of his constitutional right to a trial by a jury of his peers.

B. Exclusion of blacks

In *Smith v. Texas*, (supra) the United States Supreme Court held that "It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community." Albany County has 286,742 residents, 17,000, or roughly 6%, of whom are black. Yet, on the Jury Panel Drawn in this particular case only 1½% of the persons thereon were black. Dr. Harry Hamilton testified that such a panel was, statistically speaking, not a randomly selected panel (A 29).

Mr. Haggerty, the Albany County Commissioner of Jurors, testified that the rate of black persons who respond to Juror questionairs is "very, very poor." (A 28) Yet, many of those who did respond were excused by said Commissioner for hardship reasons.

In *Thiel v. Southern Pacific Company*, 338 U. S. 217, the United States Supreme Court denounced the exclusion, on the basis of hardship, of daily wage earners from jury duty. The court states that such an exclusion, "however well intentioned

...must be counted among those tendencies which undermine and weaken the institution of jury trial. 'That the motives influencing such tendencies may be of the best must not blind us to the dangers of allowing any encroachment whatsoever on this essential right. Steps innocently taken may, one by one, lead to the irretrievable impairment of substantial liberties.' Glasser v. United States, (315 U. S. 60, 86)."

If a prospective juror faces undue hardship while serving on jury duty he may apply to the court, pursuant to section 678 of the New York State Judiciary Law, to be excused.

C. Exclusion of students

In People v. Marr, 67 Misc 2d 113, an Albany County Case, the court sustained a challenge to the panel on the grounds that students had been systematically excluded. As mentioned earlier, the court noted that "Since most students fall in the lower age brackets, it seems reasonable to conclude that young adults in the age group 21 to 32 would be the group most adversely affected by this exclusion." The court quoted the following language from Thiel v. Southern Pacific Company (328 U.S. 217):

The American tradition of trial by jury, considered in connection with either criminal or civil proceedings, necessarily contemplates an impartial jury drawn from a cross-section of the community, Smith v. Texas, 311 U.S. 128, 129; Glasser v. United States 315 U. S. 60, 85. This does not mean, of course, that every jury must contain representatives of all the economic, social, religious, racial, political and geographical groups of the community, frequently such complete representation would be impossible.

But it does mean that prospective jurors shall be selected by court officials without systematic and intentional exclusion of any of these groups. Recognition must be given to the fact that those eligible for jury service are to be found in every stratum of society.

In reaching its decision the court also noted some "policy" arguments militating against exclusion of students from jury duty:

The court is aware of the alienation of many of our youth from the institutions of government and feels strongly that participation in government, whether by jury duty or voting or other means, will tend to decrease this sense of alienation. Jury service is an important educational experience for the citizen. It encourages the development of civic responsibility as well as the primary one of providing a fair trial, the officials who administer the jury system should take whatever positive steps are necessary to insure that young adults are fairly represented on jury lists.

On the other hand, the court stresses that jury duty is just that--a duty, it is a responsibility that all citizens should take most seriously. When in the future more young adults are called to serve on juries, they should consider very carefully whether they have sufficient reasons before seeking to be excused; they, like all of our citizens, should be prepared to make some sacrifices to assure the proper functioning of our government.

D. Judgment debtors

There could be no legal or moral basis for the exclusion of judgment debtors. Such persons suffer no loss of rights under our constitution or laws and are no less able to render an impartial, unbiased decision if called to jury duty. Economic deprivation or mismanagement (which could lead to judgment debtor status) are no indications of moral turpitude. Nor are they indications of an unsound mind, bad character,

lack of integrity, or unsound judgment (see §662(6) of the New York State Judicial Law which lists the qualifications of jurors). To deprive a judgment debtor of the opportunity of participating in the judicial process is an illegal deprivation of his rights as a citizen and an act of unconstitutional discrimination.

The exclusion of students, blacks and judgment debtors deprived appellant of his right to a trial by a jury composed of his peers and "truly representative of the community" (see Smith v. Texas, *supra*).

POINT III

THE FAILURE OF THE STATE OF NEW YORK AND THE COUNTY OF ALBANY TO PROVIDE ADEQUATE COMPENSATION TO ALBANY COUNTY JURORS RESULTS IN AN UNCONSTITUTIONAL DENIAL OF APPELLANT'S RIGHT TO AN IMPARTIAL JURY DRAWN FROM A CROSS SECTION OF THE COMMUNITY.

Appellant's right to a trial by an impartial jury drawn from a cross section of the community has already been presented (see page 4). (Smith v. Texas, *supra*, Glasser v. United States, *supra*.)

The State of New York and many private corporations pay their employees full wages while they serve on juries. There is a disproportionately large number of New York State employees in Albany County because said county embraces the City of Albany which is the Capital of New York State and the center of operations for State employees. The most recent statistics available show that as of 1971 there were approximately 35,000 New York State employees in Albany County.¹ Only 3.6% of these employees were black whereas the percentage of blacks of the total population of said county was approximately 10%.² Assuming that most of the New York State employees who work in Albany County also live in said county, they would comprise roughly 13% of its' population. Yet, they comprised 45% of the jury panel in the instant case! (A-38) (This statistic does not take into account panelists working for other "compensating"

1. Fifth Annual Report on the Occupations, Job Status and Ethnic Characteristics of Employees in New York State Agencies, 1971
2. *Id.*

organizations.)

These statistics show that while New York State employees reflect a much lower percentage of black persons than does the community as a whole, they (New York State employees) are represented far out of proportion of their numbers on Jury panels, to the substantial prejudice of black defendants.

Jurors in Albany County are paid \$8 per diem. This will cover little more than carfare and lunch expenses. The New York State Judiciary Law (§749(a)) provides that a county may pay its jurors a maximum of \$12 per day. Even this sum is inadequate and should be raised to compare with a fair daily wage (perhaps \$25) with a cost of living "escalator". The failure of Albany County to raise its jurors fees to the \$12 amount allowed by present New York State Law creates an undue hardship on poor persons summoned for jury duty.

Working black persons, most of whom work for concerns other than the State of New York or "compensating" private corporations, are at a disadvantage and would suffer a greater and often insurmountable hardship if called for jury duty, and consequently are more inclined to ask to be excused from said duty. This results in a disproportionately low number of black persons on juries in Albany County and a denial of appellant's right to a trial by a jury truly representative of, and drawn from, a cross section of the community (see *Smith v. Texas*, supra, *Glasser v. United States*, Supra.)

If the county of Albany is to judge its citizens fairly, it must attempt to make jury duty equally available to all qualified citizens.

POINT IV

THE FAILURE OF THE STATE TO AFFIRMATIVELY INSURE AN IMPARTIAL, UNBIASED, JURY REPRESENTATIVE OF THE COMMUNITY AS A WHOLE RESULTS IN AN UNCONSTITUTIONAL DENIAL OF APPELLANT'S RIGHTS.

Fifty of the prospective jurors on the instant jury panel were from the community of the city of Albany. Of these fifty only one was black, notwithstanding the fact that blacks constitute 12% of said community.

If the State is going to assume the awesome authority to judge individual citizens it must assume the corresponding duty to ensure that it does so as fairly as is humanly possible.

Laws are cold and precise. They are "words" which we use to prescribe how "reasonable" men should and should not act. Unfortunately, no one is truly reasonable. We are all human, with our emotions, passions and resultant unpredictability.

For this reason we have come up with the institution of the jury as an insulation or buffer between the cold law and the volatile human being. When necessary juries can add the ingredients of compassion and human understanding where the law does not.

Our environment or community is a substantial determinant of our mores. Thus, when one transgresses the laws of the State, community standards must come into play in judging him.

For this reason our Supreme Court has held that our juries must be truly representative of the community (Smith v. Texas, supra).

For the State of excuse the fact that there is a minuscule percentage of blacks on the jury panel with the statement that they don't respond to the questionnaires (A 27) is to shirk its duty.

Blacks and indigents have a different experience (of) the law than do whites and others. Their contacts with it are more frequent and less pleasant. Often they come to regard the law as the enemy. So it is no wonder that they fail to respond to the official questionnaire which could result in their being summoned to sit at a judicial proceeding.

The State must assume the duty of educating, publicising, and affirmatively soliciting blacks and indigents to sit as jurors. This duty will not be fulfilled until such persons are sitting on juries in their representative proportion.

In appellant's case this was ⁿt done and consequently he was deprived of his constitutional right to a trial by a jury representative of the community as a whole.

POINT V

THE FAILURE OF THE COURT IN ITS CHARGE TO THE JURY TO INSTRUCT THE JURY ON THE LAW RELEVANT TO "PERFORMANCE OF A LAWFUL DUTY BY A PEACE OFFICER" CONSTITUTES REVERSIBLE ERROR.

Appellant was charged with a violation of section 120.05 (3) of the New York State Penal Law. This section reads "A person is guilty of assault in the second degree when with intent to prevent a peace officer from performing a lawful duty, he causes physical injury to such peace officer."

Appellant did not prevent the police officers from performing a lawful duty because in fact they were not performing such a lawful duty and there was no evidence presented to establish that appellant intended to prevent the police officers from performing a lawful duty.

Trooper Curry testified that he had arrested appellant for a violation of section 501(4)(a) of the New York State Vehicle and Traffic Law in that appellant allegedly allowed an unlicensed driver to operate his car (A 33). Such a violation constitutes an "offense" under section 10 of the New York State Penal Law.

Section 140.10(1)(a) of the New York State Criminal Procedure Law provides that a police officer may arrest a person for the commission of an offense without a warrant only when "he has reasonable cause to believe that such person has committed such offense in his presence."

Appellant was never formally charged with a violation of section 501(4)(a) of the New York State Vehicle and Traffic Law because in fact he did not violate said section. The person he allowed to drive was over 18 years of age and had a learners permit. Consequently, neither the operation of the car by this person nor the authorization by appellant were illegal, and no offense had been committed in the presence of the police officers.

It is a question of fact whether or not the officers had reasonable cause to believe that an offense had been committed in their presence.

There was conflicting testimony as to whether the vehicle was moving when the police officers arrived or not. Both troopers testified that the vehicle was moving (A 31, A 32) while appellant testified that it had stopped before the officers arrived (A 34).

If in fact the vehicle had stopped before the officers arrived they could not reasonably believe that a violation of section 501(4)(a) of the New York State Vehicle and Traffic Law had been committed in their presence, and consequently could not arrest appellant without a warrant. If the arrest was illegal then the search incident to the arrest would be illegal and appellant's altercation with the officers was not preventing them from performing a lawful duty.

There was no evidence adduced at trial that appellant intended to prevent said police officers from performing a

lawful duty. In fact, appellant testified that he had told said officers that he had done nothing wrong, and that therefore, there was no reason to arrest him (A 35).

The Court should have charged that if the Jury believed defendant's testimony relating to the stationary position of the vehicle then they must find the defendant not guilty, because in such a case the police officers were not performing a lawful duty in arresting and searching defendant and his conduct did not prevent them from performing same.

Although counsel for the defendant failed to openly request such a charge, his motion for dismissal at the close of the People's case was based on the grounds herein ("The People have failed with legal sufficiency to show that a lawful duty was being performed by Trooper Curry...") and can be considered an implied request for such a charge under section 470.05 of the Criminal Procedure Law and consequently the issue is properly raised on appeal. The court also has power to review this question under section 470.15(3)(e) and section 470.15 (6)(a) of said law.

POINT VI

THE COURT ERRED IN NEGLECTING TO CHARGE THE JURY THAT A PERSON MAY USE PHYSICAL FORCE TO DEFEND HIMSELF FROM AN ASSAULT BY A POLICE OFFICER DURING THE COURSE OF AN ARREST.

The court did charge the jury that "A person may not use physical force to resist an arrest, whether authorized or unauthorized, which is being effected or attempted by a peace officer when it would reasonably appear that the latter is a peace officer."

This charge, which was repeated twice, was highly prejudicial to defendant for it would lead the jury to believe that if the defendant used any force during the arrest he should be found guilty of the crime charged. In fact, resisting arrest was not even an issue in the case. The lawfulness of the arrest was an issue and it was incumbent on the People to prove that the arrest was lawful. However, appellant's defense of justification was based on self defense. Appellant testified that he was protecting himself from an independent assault by Trooper Curry (A 36). Whether or not the arrest was lawful, defendant-appellant had a right under section 35.15(1) of the New York State Penal Law to defend himself against an assault by Trooper Curry, *People v. Sanger*, 1971, 37 A.D. 2d 632. The Court did not make this clear in its charge to the substantial prejudice of defendant-appellant.

POINT VII

THE SENTENCE IMPOSED WAS HARSH AND EXCESSIVE.

The discretion of a judge in imposing a sentence is not absolute even when the term falls within the range permitted by law. *People v. Silver*, 10 AD274, *People v. Zuckerman*, 5 NY2d 401. The Appellate Division has the right generally to reverse, modify, alter, mitigate and otherwise treat sentences imposed by courts of inferior jurisdictions. (See New York State Criminal Procedure Law, section 470.15(6)(b)).

Appellant is the father of five children. He had a previous record for assault in the second degree, as well as for grand larceny. But, as the appellant himself said:

I came out of prison, I did my parole, I went to work, and I went to school at the same time without causing any trouble as fas as doing like a citizen should do; and, in fact, up until this time, I have been doing so, taking care of my family and carrying myself as I feel a citizen should, in no way coming in conflict with the law or anything. I was trying to carry myself as a good citizen up until this point which, as I stated to the Court, I'm sorry that it happened. But, the way that I feel is that I was only protecting myself. (A 37)

Two local clerics, Father Young and Reverend Surgick as well as the president of the area chapter of the National Association for the Advancement of Colored People, Dr. Harry Hamilton, have vouched for the character and integrity of appellant.

Defense counsel, Michael Feit, ably pointed out in his

sentencing memorandum (A 15-24) the results of studies by the American Bar Association which point up the debilitating effects of incarceration in a State institution as compared with the rehabilitative benefits of probation or incarceration for a definite term in a local penitentiary (A 19). Allen Anderson was a productive member of society until his conviction of the instant charges.

It is submitted that returning him to the community under probation or sentencing him to a definite term in Albany County Penitentiary will serve the ends of Justice better than incarceration in a State institution. The first alternative would allow Mr. Anderson to return to and contribute to the community with which he has many ties. It will also allow him to support his family once again. The second alternative would bring him closer to his community and allow him to return to it after a shortened period to committment.

CONCLUSION

FOR THE ABOVE STATED REASONS, THE JUDGMENT OF CONVICTION
AND SENTENCE APPEALED FROM SHOULD BE REVERSED.